



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200  
SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

January 24, 2014

Fred Freedman  
Chief Operating Officer  
Pima Medical Institute  
780 Bay Blvd.  
Chula Vista, CA 91910

(In reply, please refer to case no. 09-13-2040.)

Dear Mr. Freedman:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Pima Medical Institute (PMI). The complainant<sup>1</sup> alleged that PMI discriminated against him on the basis of his age. The issues OCR investigated were:

1. Whether the complainant was subjected to discrimination on the basis of age in a clinical placement while he was a student at PMI.
2. Whether PMI responded adequately to the complainant's complaint that he had been subjected to discrimination on the basis of age.
3. Whether PMI subjected the complainant to discrimination on the basis of age or retaliation when it refused to readmit him to the Radiology program.

OCR investigated the complaint under the authority of the Age Discrimination Act of 1975 (AgeDA) and its implementing regulations. The AgeDA prohibits discrimination on the basis of age in programs and activities operated by recipients of Federal financial assistance. PMI receives funds from the Department and is subject to the AgeDA and the regulation.

OCR gathered evidence through interviews with the complainant, PMI employees, and witnesses employed by a hospital to which the complainant was assigned while enrolled at PMI. OCR also reviewed documents and records submitted by PMI and the complainant.

OCR concluded that PMI had not adopted procedures for responding to complaints of discrimination and did not respond adequately to such a complaint raised by the complainant, in

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<sup>1</sup> OCR notified PMI of the identity of the complainant when the investigation began. We are withholding the complainant's name from this letter to protect his privacy.

violation of the AgeDA. On November 20, 2013, PMI submitted a resolution agreement which, when implemented, will resolve this area of non-compliance. OCR determined that the evidence did not establish that PMI violated the AgeDA in connection with the complainant's treatment at his clinical placement or its refusal to readmit him to the Radiology program. The facts gathered during the investigation, the applicable legal standards, and the reasons for our determination are summarized below.

### Background

The complainant, who is currently 46 years old, was enrolled in a radiology program at Pima Medical Institute (PMI) from December 2009 until April 2012. The program consists of six semesters of courses, including four clinical externship semesters at San Diego area hospitals. The complainant was asked to leave his clinical placement during the third clinical semester, and withdrew from the program "for medical reasons" shortly thereafter.

In July 2012, the complainant filed a complaint with OCR, alleging that he had been subjected to age discrimination and harassment in his final clinical placement. His complaint was resolved through an FMCS mediation agreement in which PMI agreed to meet with him "without prejudice" to consider his reinstatement into the radiology program.

On November 30, 2012, the complainant filed a new complaint with OCR, alleging that, although the agreed-upon meeting had taken place, he had not been fairly considered. He asked to reinstate his complaint of age discrimination.

*Issue 1: Whether the complainant was subjected to discrimination on the basis of age in a clinical placement while he was a student at PMI.*

Under the AgeDA regulation at 34 C.F.R. §110.10(a), (b), and (c) a recipient may not treat individuals differently on the basis of age with regard to any aspect of services, benefits, or opportunities it provides either directly or through contractual or other arrangements. To determine whether a student has been discriminated against on the basis of age under the AgeDA, OCR looks at whether there is evidence that the student was treated differently than students of other ages under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the recipient's actions were based on the student's age.

In addition, recipients are responsible under the AgeDA for providing students with a nondiscriminatory educational environment. Harassment of a student based on age can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. In determining whether a hostile environment based on age has been

created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program.

Our investigation showed the following:

- The complainant was enrolled in four different clinical externships through PMI. In their evaluations of his clinical work during this time, all of clinical supervisors expressed concerns about his ability to communicate with patients.
- During the spring 2012 semester, the complainant enrolled in a clinical externship at Scripps La Jolla Hospital (Scripps). He received a XXX grade on his midterm evaluation, completed on March X, 2012. The evaluation included several comments regarding his lack of awareness of patient needs.
- Beginning in mid-March, several clinical staff members at Scripps expressed concerns about the complainant's performance, including two technicians who stated that he had positioned patients in a way that caused them unnecessary pain, and that they were not comfortable leaving him alone with patients. OCR reviewed the email reports of these technicians.
- The supervisor of the Scripps clinical program to which the complainant was assigned forwarded the concerns to PMI and requested that the complainant be removed from the clinical site. The supervisor stated that she had never before requested that an extern be removed from the clinic, but that she had never been informed of comparable concerns about another extern.
- The complainant alleged that, a week or two before his placement was terminated, a technician at Scripps made a remark about his age. The complainant could not recall the remark exactly, but remembered that the technician, who was about his age, followed up another comment by stating, "you are old, and I can say that." The technician who was alleged to have made the remark was not involved in the email exchange about the complainant's performance. The complainant also alleged that another technician, who was several years older than the complainant, "joked around" about their ages.
- The complainant was unable to provide OCR with any other specific examples of age-related comments. He also alleged, however, that he was subjected to more intense scrutiny than other, younger students.
- The complainant stated that he did not report the age-related remark at the time, but that he mentioned it at a meeting convened on March 29, 2012, to inform him that he had been terminated from his externship. He alleged that the PMI radiology director

told him that she would stop the conversation immediately if the complainant continued to broach this topic.

- The radiology director denied that the complainant had informed her of any age-related remarks or discrimination. The other two staff members at the March 29 meeting also stated that they had never heard the complainant mention age-related remarks.
- On April 3, 2012, the complainant informed PMI that he needed to withdraw from the radiology program for unspecified “medical reasons.”
- The PMI radiology clinical program director informed OCR that he was preparing to locate another clinical site for the complainant at the time he withdrew.

Under the Age DA, PMI is prohibited from discriminating against its students on the basis of age either directly or through contractual arrangements. For this reason, PMI had an obligation to ensure that the clinics and hospitals in which PMI placed the complainant did not subject him to adverse treatment on the basis of his age, and to respond promptly and effectively to notice that they had done so. In addition, if the complainant was subjected to discrimination in a clinical placement, PMI was prohibited from taking actions against the complainant that compounded the clinic’s discriminatory actions. Thus, for example, if Scripps had terminated the complainant’s externship because of his age, PMI could not use that termination as the basis of its own adverse actions against the complainant.

The complainant alleged to OCR that staff at Scripps made negative comments about his age, that they subjected him to greater scrutiny than younger externs and ultimately terminated his externship because of his age. The age-related comments that the complainant was able to describe, even if they were made, were not sufficiently severe or pervasive to create a hostile environment based on age by themselves. However, they may provide some evidence that the actions of the individuals who allegedly made the comments may have been motivated by age.

OCR determined that several staff members at Scripps expressed serious concerns about the complainant’s performance, including claims that he paid inadequate attention to patient pain and safety, and that he may have behaved insensitively, and possibly inappropriately, towards patients. The staff members who allegedly made comments about the complainant’s age were not among those identified as expressing concerns about the complainant’s continued participation at the hospital. The concerns expressed about the complainant’s performance at Scripps were consistent with comments included in prior evaluations at other clinical sites, which indicated that the complainant’s interactions with patients were problematic. Staff informed OCR that it was unusual for such concerns to be raised about interns, or for clinical sites to request that externs be removed. OCR did not find evidence to establish that the reasons given for the complainant’s treatment at Scripps, or his removal from his clinical

placement, were pretexts for discrimination on the basis of age.<sup>2</sup> OCR therefore concluded that there was insufficient evidence to establish that the complainant was subjected to age discrimination at his clinical placement.

*Issue 2: Whether PMI responded adequately to the complainant's claim that he had been subjected to discrimination on the basis of age.*

The AgeDA regulation, at 34 C.F.R. §110.25(c) requires recipients of federal financial assistance to adopt and publish grievance procedures providing for a prompt and equitable resolution of complaints of age discrimination. OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Our investigation showed the following:

- PMI policies allow a student who is terminated or withdraws from the radiology program to apply for readmission to the program. Pursuant to mediation conducted by the Federal Mediation and Conciliation Service in response to an earlier complaint to OCR, the complainant was considered for readmission to the program. A meeting was scheduled to allow the student to present his case for readmission.
- On September 5, 2012, prior to his readmission meeting, the complainant wrote a letter to the Chula Vista campus director of PMI, with the title "Appeal-Grievance." The letter listed a series of grievances, including the director's alleged failure to investigate a verbal complaint he had lodged about his overall treatment at Scripps, unprofessional behavior by the Radiology Program Director, possible "fraternization" between PMI administrators and Scripps clinical instructors, and general harassment at Scripps and another clinical placement. The letter mentioned the complainant's belief that some clinical instructors "are using patient care as a way to attack students personally... or discriminate [against] some of us because we are older educated men...", and alleged that the complainant and another older classmate were being subjected to harassment and intimidation. An attached narrative explained the ways in which the complainant believed he had been subjected to discrimination on the basis of age.

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<sup>2</sup> The preponderance of the evidence did not establish that the complainant notified PMI about his belief that he had been subjected to discrimination on the basis of age until after his externship was terminated. PMI's response to his eventual allegations of age discrimination is discussed in issue 2, below.

- The PMI catalog includes a statement that it is the policy of PMI not to discriminate against any person on several bases, including age. The catalog also states that harassment, including harassment on the basis of age, is not permitted, and that persons who believe they have been subjected to harassment should immediately report it to their campus director.
- The PMI catalog includes a grievance procedure for “concerns that cannot be resolved through discussion with the instructor.” The procedure does not reference discrimination or specifically require that complaints be investigated.
- OCR did not find evidence that the complainant’s allegations of age discrimination were investigated.
- By email dated October 11, 2012, the complainant was informed that his request for readmission to the Radiology program had been denied. The letter did not address the complainant’s allegations of age discrimination. The complainant did not receive any correspondence that responded to his discrimination allegations.

As part of their obligation to provide students with a nondiscriminatory environment, recipients are required to respond promptly and effectively to notice of possible discrimination. In addition, the regulations implementing the AgeDA specifically require recipients to adopt and publish procedures for promptly and equitable responding to complaints of age discrimination.

OCR determined that PMI had no procedures specifically designed to address complaints of discrimination on the basis of age, and had not informed students that the general grievance procedure should be used for that purpose. Moreover, while the existing grievance procedure required that administrators “respond” to grievances within a designated period of time, there was no requirement of an investigation. OCR concluded that PMI had not complied with the requirements of the AgeDA.

The preponderance of the evidence did not establish that the complainant informed PMI that Scripps staff had made comments about his age, or that he believed he had been subjected to age discrimination, until after his externship at Scripps was terminated. However, the complainant’s September 5, 2013, letter provided PMI with clear notice that he believed that he had been subjected to discrimination on the basis of age. OCR determined that PMI did not directly respond to his allegations, by either attempting to clarify them or investigating them. OCR concluded that this failure to respond violated the AgeDA.

On November 20, 2013, PMI provided OCR with a resolution agreement (RA) in which it agreed to adopt and publish procedures for investigating and resolving complaints of discrimination on the basis of age. Because OCR’s investigation revealed that there was insufficient evidence in this case to establish that the complainant was subjected to age discrimination at Scripps, it is not necessary for PMI to investigate the complainant’s grievance at this point. OCR determined

that implementation of the RA will resolve the areas of non-compliance identified in connection with this allegation. OCR will monitor PMI's implementation of the agreement.

*Issue 3: Whether PMI subjected the complainant to discrimination on the basis of age or retaliation when it refused to readmit him to the Radiology program.*

As noted above, the AgeDA regulation, at 34 C.F.R. §110.10(a), (b), and (c) prohibits recipients from treating students differently or depriving them of services or benefits on the basis of age. In addition, the regulation, at 34 C.F.R. §110.34, prohibits recipients from engaging in acts of intimidation or retaliation against individuals who engage in activities protected by the AgeDA or its regulation. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the recipient, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the recipient can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Our investigation showed the following:

- The complainant met with several PMI administrators on October 3, 2012. OCR listened to a recording of the meeting and discussed it with three PMI administrators. At the meeting, the PMI Chief Operating Officer referred to the complainant's September 5 letter as containing "strong language," and repeatedly asked him why, if things were so bad for him at PMI, he would want to return.
- The administrators also asked the complainant what responsibility he took for so many people having problems interacting with him, and what he believed he could do differently if he returned to PMI. He responded that he would "be more optimistic," "be more cordial," and "tame my tongue." He also stated that the September letter was written at an emotional time, and "wasn't how he felt."
- In his email explaining why the complainant would not be readmitted, the Chief Operating Officer stated that the committee had carefully considered concerns about his likelihood of successful completion, patient safety, and interpersonal communication. He also stated that the committee was influenced by the complainant's letter "detailing a lack of confidence in our professional abilities to both run the Radiography program and control what occurs on clinical sites."
- Administrators involved in the decision to deny the complainant's readmission stated that the decision was based primarily on concerns about the complainant's difficulties in the program, his unwillingness to take responsibility for those difficulties, and their

concern that there were no additional steps that PMI could take to assist the complainant.

- PMI provided information indicating that 104 students began the Radiology program between August 2008 and August 2010 (and would therefore have been expected to complete the program between August 2010 and August 2012). Ten of these students were dismissed from the program and fifteen, including the complainant, voluntarily withdrew. Sixteen students over the age of 40 began the program during this time period; two were dismissed for academic failure, and two withdrew for health reasons.

OCR first considered whether the evidence supported a conclusion that the complainant was denied readmission to the radiology program because of his age. OCR did not find evidence to connect PMI's decision to the complainant's age. PMI administrators informed OCR that it is extremely rare for a clinical site to request that a radiology student be removed from the site. The evidence did not establish that there were similarly situated younger students who had been treated differently from the complainant. OCR also examined evidence concerning students who were approximately the same age as the complainant or older, and determined that they were terminated from the program, or withdrew voluntarily, in approximately the same proportion as the overall student population.

OCR next examined whether PMI denied the complainant's request for readmission in retaliation for his complaint of discrimination on the basis of age. OCR determined that the complainant engaged in protected activity when he submitted his September 5, 2012, complaint about age discrimination. PMI's subsequent denial of his request for readmission to the radiography program constituted an adverse action. OCR concluded that the proximity in time between the two events and the administrators' repeated allusion to the letter established a connection between the adverse action and the complainant's protected activity. OCR therefore found a *prima facie* case of retaliation.

PMI informed OCR that it denied the complainant's request for readmission because of its concerns about patient safety, and because the complainant was unable to accept responsibility for the events that had led to his termination from his clinical placement at Scripps. This explanation constituted a legitimate nondiscriminatory explanation for the decision. OCR therefore examined the circumstances of the decision to determine whether the preponderance of the evidence demonstrated that the proffered reason was a pretext for retaliation.

After reviewing the circumstances of the complainant's termination from Scripps and comments on his previous clinical evaluations, OCR concluded that PMI's concerns about the complainant's ongoing problems interacting with patients were not a pretext for retaliation. OCR was concerned that the complainant's letter, and its references to discrimination, were repeatedly mentioned in both the reentry meeting and the email explaining the decision not to readmit the complainant. We determined, however, that the letter itself focused on general unfair treatment, and included accusations of fraternization between administrators and

clinical instructors as well as “offensive and unprofessional” behavior by clinical staff. The general tone of the letter supported the administrators’ concern that the complainant was deflecting responsibility for the concerns of clinical staff through a wide-ranging series of accusations, rather than considering the need to behave differently in order to succeed in the program. OCR also noted that both the complainant’s letter and his statements during the meeting were difficult to understand and to follow. This concern was raised by one of the PMI administrators, and is likely to have contributed to the decision to deny the complainant readmission to the program.

OCR concluded that the preponderance of the evidence did not establish that the reasons given for denying the complainant’s request for readmission were a pretext for retaliation or age discrimination. OCR therefore did not find that PMI’s decision to deny the complainant’s request for readmission violated the AgeDA.

This concludes OCR’s investigation of the complaint and should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that PMI may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

If you have any questions about this letter or OCR’s investigation, please contact Stan Toledo, Equal Opportunity Specialist, at (415) 486-5562 or via email at Stan.Toledo@ed.gov, or me at (415) 486-5537.

Sincerely,

/s/

Mary Beth McLeod  
Team Leader

Enclosure